IN THE COURT OF APPEALS OF IOWA

No. 1-930 / 11-0207
Filed February 1, 2012

FLOYD W. BRUNS,
Plaintiff-Appellant,

vs.

VERDES NORTHWEST, L.L.C., and ROBERT T. NAKAMARU,
Defendant-Appellees.

ROBERT T. NAKAMARU and JEANNE S. NAKAMARU, Husband and Wife, and VERDES NORTHWEST, L.L.C.,
Counter-Plaintiffs,

FLOYD W. BRUNS and PAULETTE BRUNS, Husband and Wife, and CRESTVIEW HEIGHTS HOMEOWNERS ASSOCIATION, a Non-Profit Corporation,
Counter-Defendants.

Appeal from the Iowa District Court for Scott County, C.H. Pelton, Judge.

The plaintiff appeals from the district court ruling confirming the existence of an easement across his property. **AFFIRMED.**

David A. Millage and Peter G. Gierut of Gallagher, Millage & Gallagher, P.L.C., Bettendorf, for appellant.

William Stengel and Jean Friemel of Coyle, Stengel, Bailey & Robertson, Rock Island, Illinois, for appellees.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.

A dispute over the existence of a so-called "driveway easement" gives rise to the case before us. Property owner Floyd Bruns contends the fifteen-foot easement across his lot has been vacated. He asks this court to reverse the district court order confirming the existence of the easement, arguing (1) the purpose of the easement has been extinguished, (2) the easement has been abandoned, or (3) the easement was vacated by mutual release. Because we find Bruns's evidence insufficient to support any of these theories, we affirm the district court's ruling.

I. Backgrounds Facts and Proceedings.

Floyd Bruns and his wife, Paulette, own Lots 21 and 22 in the Crestview Heights Subdivision in Bettendorf. Their home is located on Lot 21. An easement runs across a fifteen-foot strip of land along the north line of Lot 22 to the southeast corner of Lot 20, a large, unimproved lot. Lot 20 is adjacent to Outlot A, which is mostly covered by a two-acre pond. The pond, although privately owned, has been available to residents of the subdivision for recreational purposes. The easement is the only way the owners of Lot 20 and Outlot A can legally gain access to their property.

Lot 20 and Outlot A are owned by Verdes Northwest, L.L.C. (Verdes). Robert and Jeanne Nakamaru, Dennis Senftner, and Teresa Gill, the four members of Verdes, also own homes in the subdivision. Verdes Northwest purchased the lots from First Securities Company (First Securities) in 2008.

The easement was established in 1965 with the original plat of Lot 22. The plat map describes it as "EASEMENT FOR DRIVEWAY." Bruns purchased Lot 22 in 1982. At a January 11, 2006 Crestview Heights Homeowners Association meeting, the following resolution was passed at the request of Bruns and his wife, who was a member of the association's board of directors:

> Be it resolved that the 15-foot access easement located on the following described real estate is hereby vacated and released and shall no longer be deemed an easement on said real estate. The easement being vacated is located along the following-described real estate situated in Scott County, Iowa, to-wit:
>
> Lot 22 in Crestview Heights in the City of Bettendorf, Scott County, Iowa.

After the association passed the resolution, the Brunses built a stone garden across the east end of the easement, creating an impediment to its use.

On May 19, 2009, Floyd Bruns filed a petition seeking to have the court determine the boundary on the west side of his property.[1] In their resistance and counterclaim, the defendants—Verdes Northwest and its members—asked the court to enter judgment declaring the rights of the parties with respect to the driveway easement. The matter was tried on October 6, 2010. In its October 15, 2010 ruling, the court confirmed the existence of the driveway easement and ordered Bruns to remove any obstruction to its access.

Bruns filed a timely notice of appeal after the court denied his motion to enlarge or amend.

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[1] This portion of the action and the court's ruling thereon is not the subject of this appeal.

II. Scope and Standard of Review.

This action was tried in equity. Accordingly, our review is de novo. Iowa R. App. P. 6.907; *Master Builders of Iowa, Inc. v. Polk County*, 653 N.W.2d 382, 388 (Iowa 2002). We examine the facts, as well as the law, and decide the issues anew. *SDG Macerich Props., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 584 (Iowa 2002). Although the district court's findings of fact are not binding, we give them weight. *Id.* We especially accord deference to the district court's assessment of the credibility of witnesses. *Rubes v. Mega Life & Health Ins. Co., Inc.*, 642 N.W.2d 263, 266 (Iowa 2002).

Bruns has the burden to prove by clear and convincing evidence the easement has been vacated. *See National Props. Corp. v. Polk County*, 386 N.W.2d 98, 105 (Iowa 1986).

III. Analysis.

Bruns contends the district court erred in determining the driveway easement was not vacated. He advances three theories: (1) the easement's intended purpose ceased to exist, (2) the easement was abandoned, and (3) the easement was mutually released by the dominant and servient owners.

A. Intended purpose ceased to exist.

Bruns first argues the court erred in confirming the easement because the purpose for the easement ceased to exist. *See Beim v. Carlson*, 209 Iowa 1001, 1010, 227 N.W. 421, 424 (1929) (citing "well-recognized rule of law that a grant of a right of way for a particular purpose terminates as soon as the said purpose ceases to exist"). Bruns relies on our supreme court's decision in *First Securities*

Company v. Dahl & Nakamura, 560 N.W.2d 327 (Iowa 1997). In that case, First Securities—the previous owner of Lot 20 and Outlot A—sought to remove a restriction on its ownership of Lot 20. *First Securities*, 560 N.W.2d at 328. Specifically, the case involved a "52-foot road and utility easement" that crosses Outlot A and connects to the fifteen-foot driveway easement at issue here. *See id.* The court agreed an affidavit executed by the secretary for First Securities created a restrictive covenant preventing the use of Outlot A for road purposes. *Id.* at 332.

Bruns argues the driveway easement has been extinguished because it was established for the particular purpose of allowing vehicles to cross to the fifty-two-foot roadway easement on Outlot A, which can no longer be used as a roadway. We disagree. The driveway easement is not a roadway easement. The record shows that the driveway easement provides access to Lot 20 and Outlot A by foot or vehicle. That purpose is not extinguished by the roadway restriction on Outlot A.

B. Abandonment.

Bruns next contends the driveway easement has been abandoned because it has never been used as a driveway. He further argues the resolution passed by the Crestview Heights Homeowners Association shows an intent to abandon the easement.

Rights under an easement may be lost by abandonment. *Allamakee Cnty. v. Collins Trust*, 599 N.W.2d 448, 451 (Iowa 1999). To prove abandonment, actual acts of relinquishment accompanied by an intention to abandon must be

shown. *Id.* Nonuse is not enough. *Id.* The record must include affirmative evidence of a clear intent to abandon. *Id.* Furthermore, nonuse does not forfeit rights granted under a written easement unless it is for a period of ten years or more. *See Krogh v. Clark*, 213 N.W.2d 503, 505 (Iowa 1973) (holding nonuse must be for the same period as adverse possession to forfeit rights under a written easement); *see also Garrett v. Huster*, 684 N.W.2d 250, 253 (Iowa 2004) (stating adverse possession must be shown for at least ten years).

Bruns argues the easement has been abandoned by non-use because it has not been used as a "driveway"—suggesting vehicular use of the easement is required. We again disagree. Our supreme court rejected this reasoning in *Harrington v. Kessler*, 247 Iowa 1106, 1112, 77 N.W.2d 633, 636 (1956), holding:

> Defendants' contention must be rejected that the only material evidence which could refute the alleged abandonment was proof of its use for driveway purposes by actual vehicular travel, and that its use for bicycle or foot travel would not be sufficient. We do not agree that the term 'for driveway purposes' as used here must be so narrowly construed. Its use for bicycles, handcarts, and foot travel must also be given consideration, and is quite persuasive that no intention existed to abandon this right of way.

Here, there is evidence the easement has been used in the past ten years by those traversing it on foot. Because the easement is still in use, Bruns has not met his burden of proving the easement has been abandoned.

C. Release.

Finally, Bruns claims the easement was vacated by mutual release between the dominant and servient estate owners. He argues the 2006 resolution passed by the Crestview Heights Homeowners Association was a mutual release. His argument assumes the homeowners association is the

owner of the dominant estate, stating without support that it is "clear from the evidence that the homeowner's association had the right to vacate the easement."

At the time the resolution was passed, First Securities—and not the homeowners association—owned the dominant property. Even if the association had the authority to release the easement, we share the district court's concern that the easement users were not afforded notice of the resolution before it was passed by the association. The owner of First Securities testified he had no notice of the release of the easement, never received an agenda or announcement of a meeting from the board of directors, and had no idea of the action taken by the homeowners association until the commencement of this lawsuit. This testimony undermines Bruns's contention that the release of the easement was mutual. Mutual means "directed by each toward the other, reciprocal." Black's Law Dictionary 1039 (7th ed. 1999). Without notice of the resolution, the dominant estate owner could not participate in a reciprocal action. Bruns has failed to show the easement was vacated by mutual release.

D. Summary.

Bruns has failed to prove the driveway easement across his property was vacated under any of the theories advanced in the district court. Accordingly, we affirm the court's order confirming the easement and directing Bruns to remove any impediments to its use.

AFFIRMED.